

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 17, 2005

TO : B. Allen Benson, Regional Director
Region 27

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: King Soopers 530-5756
Case 27-CA-19325 530-5892
530-8020-5000
Safeway 530-6033-4210
Case 27-CA-19326

Albertson's
Case 27-CA-19327

The Region submitted these cases for advice on whether the Employers' bargaining tactics, which included use of the same bargaining agent, the presence of all Employers at single-Employer bargaining sessions, the presentation of nearly identical contract proposals, and the execution of a Mutual Strike Assistance Agreement, constituted multiemployer bargaining without the Union's consent in violation of Section 8(a)(5), or merely amounted to a lawful coordinated bargaining strategy. We conclude that the Employers' conduct was lawful coordinated bargaining.

FACTS

For some time, the United Food and Commercial Workers Local 7 ("the Union") has represented employees of the three Employers in separate bargaining units. The parties have in the past engaged in coordinated bargaining that has resulted in substantially similar collective-bargaining agreements. The latest contracts between the Union and the Employers, which were due to expire in September 2004, contained nearly identical terms and conditions of employment.

In July 2004,¹ the Union prepared to meet separately with each Employer to negotiate contracts to succeed the ones expiring in September. The first session was on July 21 with Albertson's representatives. Albertson's principal negotiator was Michael Severns, of the Mountain States Employers Council. Representatives from King Soopers and Safeway were also present. Severns requested on behalf of

¹ All subsequent dates are 2004 unless otherwise indicated.

all three Employers that the Union agree to multiemployer bargaining. The Union declined. Severns stated that the Employers would engage in coordinated bargaining. The King Soopers and Safeway representatives remained at the table for the duration of the Albertson's bargaining session.

Later that day, the Employers provided the Union with a joint letter confirming that the Union had declined multiemployer bargaining and that the Employers intended to engage in coordinated bargaining. The letter explained that representatives of each Employer intended to be present during all negotiations, but that each Employer remained free to make their own bargaining decisions. The Employers also requested that bargaining sessions for all Employers be combined. The Union responded by letter dated July 22 reiterating that it was not willing to engage in multiemployer bargaining. The Union contended that the presence of representatives from all three Employers at bargaining sessions would amount to an illegal insistence on multiemployer bargaining.

In the following weeks, the Employers individually sent letters reiterating their position that they were engaging in coordinated bargaining and were maintaining independent decision-making during negotiations. The Employers also stated that in using a mixed bargaining committee with representatives of all three Employers, they were merely exercising their lawful right to designate members of their bargaining team.

The parties conducted many bargaining sessions, some of them for individual Employers, some of them jointly. The Employers used the same bargaining team in joint sessions, led by Severns with participation by representatives from the three Employers. In single-Employer bargaining sessions, only the representative from that Employer took an active role, along with Severns. The Employers presented nearly identical bargaining proposals. The Employers' proposals varied in some respects, such as the "after-acquired store" language, Employer-specific health insurance proposals, and some provisions on wages, bonuses, and pension contributions. For the most part, each Employer's proposals were discussed separately and occasionally included discussion of issues that were unique to one Employer. The Union's proposals to each Employer were also substantially similar, as had been the case in past negotiations.

In September, the parties sought the assistance of a federal mediator, who suggested conducting joint sessions for all Employers. The Employers presented the Union with a proposed agreement to conduct joint sessions while

acknowledging that they were not engaged in multiemployer bargaining. The Union refused to sign the agreement, but agreed to the mediator's request for joint sessions.

Around this time, the Union made plans to conduct strike authorization votes in each of the Employers' units. In response, on October 25, the Employers entered into a Mutual Strike Assistance Agreement ("MSAA") in which they pledged to support each other in the event of a Union strike. The MSAA sets forth a revenue sharing plan in case the Union strikes some, but not all, of the Employers.

On November 1, the Employers presented their final offers. Like their early proposals, the final offers were nearly identical. In response, the Union actually conducted the strike authorization votes, but the International Union eventually called off the strike plans. The Unions have not struck; the MSAA has not been implemented.

The parties returned to the bargaining table on December 3. The Employers adhered to their final offers. Negotiations stalled for some time, but nobody declared impasse. None of the Employers implemented their final offers.

In January 2005, King Soopers resumed negotiations individually with the Union. King Soopers and the Union have since agreed to a mediator-assisted procedure for settling the bargaining dispute. King Soopers has agreed to accept in advance a mediator-drafted contract proposal; the Union in turn has agreed to submit that proposal to a ratification vote within 21 days of presentation by the mediator. This mediated process is currently taking its course.

Safeway and Albertson's also discussed with the Union the possibility of entering into a similar mediation proposal procedure, but have not reached agreement.

ACTION

We conclude that the Employers have engaged in lawful coordinated bargaining. Although they have shared bargaining strategies, there is no evidence that the Employers ceded their respective individual decision-making authority to the group. Thus, the Region should dismiss the charges alleging that the Employers unlawfully forced the Union into multiemployer negotiations.

A party's insistence on bargaining outside the scope of the established bargaining unit violates the Act.² Absent the other party's consent to enlarge the unit, it is unlawful to use bargaining tactics that effectively treat separate units as a single one. For example, a union violates Section 8(b)(3) by using a pooled ratification procedure that conditions agreement in one unit to agreement being reached in other units.³ Also, employers violate Section 8(a)(5) by insisting on joint bargaining in which they give up individual decision-making authority over their bargaining units to the other employers as a group.⁴ It is not unlawful, however, to use coordinated bargaining tactics if they do not effectively amount to a merger of bargaining units.⁵

There is no evidence that the Employers in this case have forced a merger of their separate units by their coordinated bargaining strategy. The presence of representatives from other Employers during individual Employer bargaining sessions does not necessarily indicate

² Don Lee Distributor, Inc., 322 NLRB 470, 471 (1996), enf'd 145 F.3d 834 (6th Cir. 1998), cert. denied 525 U.S. 1102 (1999), and cases cited therein.

³ See, e.g., Paperworkers Local 620 (International Paper Co.), 309 NLRB 44, 45 (1992). See also, Utility Workers Local 111 (Ohio Power Co.), 203 NLRB 230, 239 (1973), enf'd mem. 490 F.2d 1383 (6th Cir. 1974) (union unlawfully withheld offers from ratification until employers made identical offers to other separate units).

⁴ Don Lee Distributor, 322 NLRB at 471 (six employers violated Section 8(a)(5) when, without the union's consent, they entered into a pact that set minimum objectives for their respective contracts, enabled three employers to veto another's contract, and provided substantial financial penalties for an employer whose contract terms exceeded the group's stated objectives).

⁵ See, e.g., General Electric Co., 173 NLRB 253, 255 (1968), enf'd in rel. part 412 F.2d 512 (2d Cir. 1969) (interunion collaboration in negotiations with employer was not inherently improper). See also, Abbott Northwestern Hospital, 343 NLRB No. 67, slip op. at 1 & n. 4 (2004) (General Counsel did not allege as unlawful employers' common bargaining strategy by which they shared information and sought common results but retained freedom settle on individual terms).

multiemployer bargaining.⁶ Representatives of other Employers did not take an active role in the sessions for individual Employers and did not speak on any individual Employer's behalf. There is no evidence that their presence injected extra-unit matters into the individual Employer's negotiations.⁷ Nor is there any evidence that Employer representatives present at another's negotiations were actively participating in that Employer's decision-making process.

The fact that the Employers presented nearly identical proposals also fails to establish multiemployer bargaining. It is well-settled that cooperating to seek uniform contract terms for separate bargaining units does not change the scope of the unit as long as agreement in a single unit is not dependent on agreement in the other units.⁸ The commonality of the Employers' proposals here

⁶ Electrical Workers IBEW Local 46 (Puget Sound), 302 NLRB 271, 273 (1991) (employer's bargaining through committee that included representatives of other companies was not unlawful joint bargaining; union not privileged to refuse to bargain on that basis); Imperial Outdoor Advertising, 192 NLRB 1248, 1248-49 (1971), enf'd 470 F.2d 484 (8th Cir. 1972) (employers' use of same individual as bargaining representative not indicative of multiemployer bargaining). See also, NLRB v. Indiana and Michigan Elec. Co., 599 F.2d 185, 191 (7th Cir. 1979), cert. denied 444 U.S. 1014 (1980) (union's use of bargaining committee that included members of other units was not an unlawful attempt to force company-wide multi-unit bargaining).

⁷ See, General Electric Co., 173 NLRB at 255 (presence of members of other units on union's bargaining committee did not amount to forced company-wide bargaining where issues from other units were not injected into negotiations).

⁸ Dairy Employees' Local 754 (Glenora Farms Dairy), 210 NLRB 483, 486 (1974) (employers' practice of signing substantially identical contracts did not establish multiemployer unit); Council of Bagel and Bialy Bakeries, 175 NLRB 902, 902-903 (1969) (individual bakeries did not engage in multiemployer bargaining by bargaining through council and seeking common contract terms where each bakery retained right accept or reject contract negotiated by council); Electric Theater, 156 NLRB 1351, 1352 (1969) (history of group bargaining resulting in substantially identical contracts did not create multiemployer unit); Van Eerden Co., 154 NLRB 496, 499-500 (1965) (employers did not form multiemployer unit by signing substantially identical contracts because they never agreed to be bound by each other's decisions). See generally, United Mine Workers v.

was merely consistent with the parties' bargaining history of substantially similar contracts. Indeed, the Union's proposals to each Employer were also substantially the same, as they had been in the past. There is no evidence here that the Employers were, in effect, seeking to reach a single contract or avoiding individual contract settlement. Although their contract proposals were very similar, they included Employer-specific variations. There is no evidence that the Employers avoided discussing Employer-specific issues; rather, Employer-specific issues were discussed as necessary. Indeed, the recent course of negotiations, in which King Soopers has individually agreed to mediated settlement of the dispute, supports the Employers' repeated contentions that they remained free to settle on individual terms. In contrast to Don Lee, there is no evidence here that the Employers bound themselves to accept only common contractual terms.

Neither is the Employers' execution of the MSAA late in the bargaining proof that they were bound together in multiemployer bargaining. The MSAA does not establish any common bargaining goals, nor does it provide any authority for the group to act on behalf of a particular Employer.⁹ The MSAA is merely a pact to assist each other financially in the event of a Union strike and, therefore, constitutes a defensive economic weapon in response to the Union's own use of an economic weapon. The use of various types of economic weapons by parties engaged in labor negotiations has long been held lawful.¹⁰ Even employers bargaining separately, outside a multiemployer unit, may band together in mutual aid pacts in order to enhance their economic weapons.¹¹ The existence of a mutual aid pact between

Pennington, 381 U.S. 657, 661 (1965) (attempts to achieve uniform labor standards is legitimate bargaining goal).

⁹ Cf. Don Lee, 322 NLRB at 470-71 (employers' pact established minimum bargaining objectives, allowed a number of employers to veto another's contract, and provided significant penalties for agreeing to contract terms inconsistent with the stated bargaining objectives).

¹⁰ NLRB v. Insurance Agents' Union, 361 U.S. 477, 489 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system" recognized by the Act).

¹¹ Capitol District Sheet Metal, 185 NLRB 702, 715-716 (1970) (employers, not engaged in multiemployer bargaining, lawfully cooperated in lockout pact to present a united front against union demands); Evening News Ass'n, 166 NLRB 219, 222 (1967), enf'd 404 F.2d 1159 (6th Cir. 1968), cert.

employers does not, absent more, establish multiemployer bargaining.¹² Given that the Employers' MSAA does not commit the Employers to common bargaining results, its mere existence does not establish multiemployer bargaining.¹³

In sum, nothing in the Employers' coordinated bargaining strategy indicates that they bound themselves to each others' negotiations in an effort to achieve a single, multiemployer contract. Accordingly, we conclude that the Region should dismiss the charge alleging that the Employers engaged in multiemployer bargaining without the Union's consent.

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denied 395 U.S. 923 (1969) (lawful lockout pact between employers who were not engaged in multiemployer bargaining but had common interests). See also, Abbott Northwestern Hospital, 343 NLRB No. 67, slip op. at 4 (mutual aid pact between employers who were bargaining separately was unlawful only to the extent it was applied by some employers after they had already settled their bargaining dispute with the union).

¹² Newspaper Drivers & Handlers' Local No. 372 v. NLRB, 404 F.2d 1159, 1161 n.2 (6th Cir. 1968) (secret pact among employers to engage in supportive lockouts was not an attempt to form multiemployer unit where employers did not agree to be bound to the negotiations of the others).

¹³ It is unclear whether the MSAA, as a profit-sharing plan, would violate antitrust laws. But the Union's charge does not allege the pact as being independently unlawful under the Act or antitrust laws. In any event, the plan has never been implemented.